SHAW AND SHAW LTD. v. GOH CHIN HOCK

[F.C. (Azmi L.P., Ali and Raja Azlan Shah F.JJ.) April 20, 1974]

[Penang — Federal Court Civil Appeal No. 84 of 1973]

Landlord and Tenant — Illegal extensions to building — Whether exposing landlords to penalty, fine or forfeiture — Whether reasonable to make order of possession — Discretion of trial judge — Control of Rent Ordinance, 1966, s. 16(1)(k).

In this case the appellants had obtained in the Sessions Court an order of possession of certain premises on the ground that the tenant had made illegal extensions to the building and this exposed the landlords to a penalty, fine or forfeiture within the meaning of section 16(1)(k) of the Control of Rent Act, 1966. The judgment of the Sessions Court had been set aside in the High Court and the appellants appealed to the Federal Court.

Held: (1) in this case the learned President of the Sessions Court was right in holding that the landlords had been exposed to a penalty, thereby giving rise to a right for possession;

(2) the learned appeal judge in this case erred in interfering with the discretion exercised by the trial President and therefore the appeal must be allowed and the order for possession confirmed.

Cases referred to:-

(1) *Public Prosecutor* v. *Sivasupramaniam* [1969] 2 M.L.J. 86.

(2) *Ho Tong Cheng & Ors.* v. *Oversea Chinese Banking Corporation Ltd.* [1969] 1 M.L.J. 129.

FEDERAL COURT.

T. R. Hepworth (*Augustine* with him) for the appellants.

Karpal Singh for the respondent.

Ali F.J. (read by **Raja Azlan Shah F.J.**): This is an appeal from the judgment of the High Court Judge at Alor Star who in an appeal from the Sessions Court, Alor Star, set aside an order of possession granted by that court. It was common ground that the premises in question was controlled premises subject to the operation of the Control of Rent Act, 1966 (hereinafter referred to as the Act). The landlords' claim for possession was based on section 16(1)(k) of the Act which provides as follows:

"16.(1) Except for an application made under sections 18 and 18A for the recovery of possession of any controlled premises or any part thereof for the purpose of effecting or causing to be effected thereon any development, all applications for the recovery of possession of such premises or any part thereof shall be made to a court; and no order or judgment for the recovery or possession of any controlled premises or any part thereof comprised in a tenancy shall be made or given by the court except in any of the following cases —

x x x

(k) where the tenant or any other person occupying the controlled premises under him has committed a breach of any provision of any written law in force in the Federation relating to local authorities, or of any rule or by-law made thereunder, affecting the premises which exposes the landlord to any penalty, fine or forfeiture, and the court considers that such order or judgment should be made or given;"

It is clear from the evidence on record that the premises which was originally a small attap shed has been so extended or added to that it has now become what is known as the White Palace Bazaar. The extensions or additions were illegal in the sense that they were not authorised by the local authority, the Town Council, Alor Star, as required by the building regulation or by-laws.

Sometime in June, 1966 the Town Council served on the tenant and some of his subtenants notices to demolish the extensions or additions. The notices were ignored. In October, the landlords gave notice terminating the tenancy and subsequently commenced an action for possession in the Sessions Court. At the conclusion of the trial the court made an order of possession which was set aside by the High Court on appeal. A retrial was ordered. An order of possession made at the retrial was also set aside by the High Court on appeal. Hence the present appeal.

Two issues fell to be considered by the trial court and the High Court. Firstly, whether the illegal extensions expose the landlords to a penalty, fine or forfeiture for the purpose of section 16(1)(k) of the Act; and secondly, whether in the circumstances of the case it was reasonable to make an order of possession.

On the evidence and arguments before him the trial President held that the landlords have been exposed to a penalty, thereby giving rise to a right for possession. Counsel for the tenant relied on *Public Prosecutor* v. *Sivasupramaniam*[1] as authority for the view that the landlords have not been so exposed as the persons responsible for the unauthorised buildings, the subtenants could be ascertained and prosecuted. In our opinion the case cited is not an authority for such a view. We agree with the trial President with whom the learned appeal judge also agreed that in the circumstances of the case the landlords have been exposed to a penalty. In *Ho Tong Cheong & Ors.* v. *Oversea Chinese Banking Corporation Limited*[2] the Privy Council held that all that is necessary for the landlord to show is that the breach at the time it was committed exposed the landlord to a penalty. The principle applies to the instant case. Accordingly, the only question for our consideration is whether the learned appeal judge was right in interferring with the discretion exercised by the trial President. It is well established that an appellate court will so interfere only in the rarest of cases.

We refused Mr. Karpal Singh, counsel for the tenant, leave to argue on the point whether the landlords have been exposed to a penalty. We did so not only because counsel has not given notice to cross-appeal but also because we could find nothing in his previous arguments which could lead us to conclude that the trial President and the learned appeal judge erred in holding that the landlords have been exposed to a penalty.

We allowed the appeal on the date of hearing, December 30, 1973, for the reason that in our opinion the learned appeal Judge erred in interferring with the discretion exercised by the trial President. We are satisfied that in making the order of possession the trial President has considered all the evidence before him. We agree that but for the presence of the subtenants who were brought in by the tenant for his own gain or benefit, the illegal extensions would not have been there. In our view the trial President was entitled to take a dim view of the fact that the tenant in complete disregard of the law has made an illegal extension himself even though he has been served with the demolition notice by the Town Council and also after the action has been filed against him. We agree

with the trial President and the learned appeal Judge that the White Palace Bazaar is an eye-sore and a public hazard in the event of an outbreak of fire. In our view the tenant is not the kind of person who should continue to enjoy protection of the Act.

As for the reasons given by the learned appeal Judge for setting aside the order of possession we are satisfied that they are not valid reasons. The trial President did not consider the conduct of the landlords in continuing to accept rents plainly because waiver was not pleaded or argued at the trial. It is not correct for the learned appeal Judge to say that the trial President failed to consider the interest of the tenant. He referred to it in his judgment and gave reasons why he considered it reasonable to make an order of possession. As for the order directing the landlords to compensate the defendants by paying four years' rent this cannot be a ground for setting aside the order of possession. It may well be that the trial President has no power under the Act to make such an order but since the landlords who could have complained have not done so we cannot see why we should be so concerned about it.

Azmi L.P. and **Raja Azlan Shah F.J.** concurred.

Solicitors: *Oliver Phipps; Karpal Singh, Wong & Co.*

PAIDIAH GENGANAIDU v. THE LOWER PERAK SYNDICATE SDN. BHD. & ORS.

[F.C. (Ali, Ong Hock Sim and Raja Azlan Shah F.JJ.) April 25, 1974]

[Ipoh — Federal Court Civil Appeal No. 95 of 1973]

Companies — Claim on behalf of minority shareholders alleging that resolution of company is null and void — Ultra vires — Fraud on minority — Companies Act, 1965, s. 19(1)(c).

In this case the appellant, representing the minority shareholders of a private company, the first respondent, claimed for a declaration that a resolution passed at the Extraordinary General Meeting of the company was null and void on the ground that it was *ultra vires*, illegal and a fraud on the minority.

The resolution was to the effect that the second and third respondents, against whom judgment had been obtained for a wrong done to the company, were to be relieved of the liability to pay half of the judgment debt and taxed costs. The action was dismissed in the High Court and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) the appellant could not maintain the action unless his case fell within the two exceptions to the rule in *Foss* v. *Harbottle*,(1) that is, that the resolution was *ultra vires* and illegal and that it was a fraud on the minority;

(2) in this case the learned trial judge was right in holding that the resolution was not *ultra vires* or illegal and that it was not a fraud on the minority and therefore the appeal must be dismissed.

Cases referred to:-

(1) *Foss* v. *Harbottle* (1843) 2 Hare 461.

(2) *Edwards & Anor.* v. *Halliwell & Ors.* [1950] 2 All E.R. 1064, 1066.

(3) *Allen* v. *Gold Reefs of West Africa Ltd.* [1900] Ch. 656.

(4) *Greenhulgh* v. *Arderne Cinemas Ltd. & Ors.* [1950] 2 All E.R. 1120.

FEDERAL COURT.

M. Sivalingam for the appellant.

Ng Yook Woon for the first respondent.

A. Mahendran for the second and third respondents.

Ali F.J. (read by **Raja Azlan Shah F.J.**): This is an appeal from the dismissal of an action by the appellant, representing the minority shareholders of a private company, the first respondent.

The claim in the action is for a declaration that a resolution passed at the Extraordinary General Meeting of the company held on December 22, 1971 is null and void on the ground that it is *ultra vires*, illegal and a fraud on the minority. The resolution was in the following terms:

(i) "that the proceedings for the attachment of 9 ordinary shares of $100 each in the Lower Perak Motor Service Company Limited standing in the name of K. Krishnan (i.e. the second defendant) be stayed;

(ii) that the proceedings for the attachment of 45 ordinary shares of $100 each and 40 ordinary shares of $100 each in the Lower Perak Syndicate Sendirian Berhad (i.e. the first defendant company) standing in the names of K. Krishnan (i.e. the second defendant) and V. Thangavelu (i.e. the third defendant) respectively be stayed; and

(iii) that K. Krishnan and V. Thangavelu be allowed to settle the judgment sum of $10,345.05 and the sum of $3,063.39 taxed costs in Ipoh High Court Civil Suit No. 187 of 1970 in the sum of $6,704.22 within three months of passing this resolution."

It was passed by the majority votes of shareholders, present or by proxies. In terms of the resolution Krishnan and Thangavelu, the second and third respondents respectively, against whom judgment was obtained for a wrong done to the company, are to be relieved of the liability to pay half of the judgment debt and taxed costs.

The evidence at the trial consisted of documents in the agreed bundle and the oral testimony of the Secretary of the company who gave evidence for the appellant. The respondent elected not to adduce any evidence. Except for the Memorandum and Articles of Association nothing else seems to have any material bearing on the issue or issues in this case.

The issues, (a) that the resolution is *ultra vires*, illegal, and (b) that it is a fraud on the minority, are based on two exceptions to the rule in *Foss* v. *Harbottle*.(1) The rule was aptly stated by Jenkins L.J. in *Edwards & Another* v. *Halliwell & Others*(2) in these words:

"The rule in *Foss* v. *Harbottle*,(1) as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*."

In terms stated the appellant cannot maintain the action unless his case falls within either of two exceptions which were referred to by Jenkins L.J. in his judgment on page 1067 as follows: